No. 86-1304

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARSHALL CAIFANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' failure to state in writing its reasons for affirming petitioner's sentence under the Dangerous Special Offender statute, 18 U.S.C. 3575-3576, where petitioner never requested such a written statement on direct appeal, denied petitioner due process and requires vacation of his sentence on collateral attack.

2. Whether petitioner's trial attorney was constitutionally ineffective for (1) failing to object to evidence on the ground that it related to a count for which petitioner had earlier been acquitted, when the evidence was admissible to prove a pending charge of conspiracy; (2) failing to prevent inadvertent admission of evidence of petitioner's prior incarceration during the testimony of a government witness, when petitioner himself admitted and explained his prior convictions; and (3) failing to seek exclusion of petitioner's prior convictions, when the convictions were admissible under Fed. R. Evid. 609(b).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order affirmance of the court of appeals (Pet. App. 4a) is reported at 807 F.2d 997 (Table). The opinion of the district court (Pet. App. at 1a-3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1986. The petition for a writ of certiorari was filed on February 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of interstate transportation of stolen securities and of conspiracy to possess and to transport such securities, in

violation of 18 U.S.C. 2314 and 371.[1] The district court, after a hearing, found petitioner to be a dangerous special offender under 18 U.S.C. 3575 and sentenced him to 20 years' imprisonment. The court of appeals, in an unpublished opinion, affirmed petitioner's convictions and sentence in January 1982. In 1986, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court summarily denied the petition (Pet. App. 1a-3a), and the court of appeals affirmed in a per curiam order (*id.* at 4a).

1. Petitioner was convicted for his involvement in a scheme to dispose of blank stock certificates that were stolen at O'Hare Airport in October 1968. App., *infra*, 1a-2a. The district court then held a hearing on the government's request to have petitioner sentenced under the Dangerous Special Offender (DSO) statute, 18 U.S.C. 3575. The evidence at the hearing showed that petitioner had a long history of violent and illegal activities and a reputation as an "enforcer" in organized crime (17 R. 889).

Jimmy Fratianno, a former mobster who was cooperating with the government in a number of investigations and prosecutions, testified that petitioner was initially introduced to him in 1952 as a member of the Cosa Nostra (17 R. 712, 716). Alva Rodgers, a former associate of petitioner's at the Atlanta Penitentiary and the government's main witness against petitioner at trial, testified that petitioner had spoken of his lifelong membership in the Chicago organized crime family and claimed to have been

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[1] Petitioner was charged, in a three-count indictment, with conspiracy to possess and to transport stolen stock certificates, with interstate transportation of such certificates between Illinois and Florida, and with interstate transportation of some of the certificates between Florida and Texas. At petitioner's first trial, the jury acquitted him of the third charge but was unable to reach a verdict on the remaining two counts. At his second trial, petitioner was convicted on both those charges.

part of the "Outfit," as the Chicago crime syndicate is called, since he was 19 years of age (17 R. 784, 788). Petitioner had told Rodgers that he was a hit-man for the Chicago organization and boasted that he was good at the job (17 R. 789-790). A Chicago police captain and FBI Special Agent O'Rourke further testified to petitioner's long-time membership in the Chicago organized crime syndicate (17 R. 899, 911). In addition, state and federal law enforcement officers suspected petitioner of involvement in at least two murders and one attempted murder.

The victim of the first suspected murder was Ray Ryan. In 1963, petitioner and two others approached Ryan, a wealthy oil man and known gambler (17 R. 879), and demanded that Ryan pay $60,000 to the Chicago syndicate. Ryan refused and was pursued to Las Vegas, where petitioner and others threatened him and beat him up. Ryan ultimately testified against petitioner (17 R. 881) and was instrumental in securing petitioner's conviction for extortion. Afterwards, petitioner sought revenge and asked Joey Lombardo, a member of the Chicago organization, to arrange for Ryan to be killed. Lombardo proposed instead that Ryan pay $1 million to the Chicago organization to compensate for petitioner's imprisonment, but Ryan refused (17 R. 822-823). On October 18, 1977, Ryan was killed by a dynamite bomb when he started his car (17 R. 880-881; see also 17 R. 730).

Petitioner was also suspected of involvement in the murder of Richard Cain, a courier for Sam Giancana, the former head of the Chicago organized crime family (17 R. 875-876). In 1973, Cain and Giancana severed their association. In December 1973, petitioner told Rodgers that he had tried to kill Cain but that the effort had been aborted. Later that month, petitioner went to a sandwich shop where Cain was eating; after petitioner left, Cain was

shot in the neck by a man wearing a ski mask (17 R. 812-816, 877-878). Petitioner subsequently told his associate, Rodgers, that Joey Lombardo had killed Cain (17 R. 818).

Petitioner was further suspected of involvement in the attempted murder of Louis Barbe, who had been cooperating with the government in a state insurance fraud prosecution of petitioner (17 R. 872-875, 877). After petitioner was charged, but before his trial began, Barbe was seriously injured by a dynamite bomb that exploded when Barbe started his car (17 R. 873-875). Barbe subsequently decided not to testify against petitioner (18 R. 1024; see also 17 R. 718-725).

According to FBI Special Agent O'Rourke, informants reported that after petitioner's release from the Atlanta Penitentiary in 1972, petitioner progressed from extortion of pornography businesses into wholesale pornography distribution (17 R. 806-809, 900-901). In addition, petitioner repeatedly admitted at the district court hearing that he returned to illegal bookmaking and gambling within a month of his release in 1972 and that he began to finance illegal bookmaking operations (18 R. 1013-1017). The Racine Social Club, which was in petitioner's district, paid petitioner a percentage of its profits in order to stay in business (17 R. 795). Finally, petitioner himself corroborated the testimony of Rodgers, Fratianno, and the two law enforcement officers concerning his long-standing association with several organized crime figures (*e.g.*, 17 R. 712, 714-715, 727, 784, 790, 792, 806; 18 R. 1017-1019, 1024, 1031-1032, 1034, 1055).

Based on evidence at the trial, at the hearing, and in the presentence report, the district court found that petitioner was an active member of organized crime and that he supported himself in part through payments from pornography and gambling operations, as well as through

sham salaries paid by two legitimate businesses (18 R. 1097-1098; see also 17 R. 792-794). Accordingly, the court found that petitioner was "dangerous" within the meaning of the DSO statute. After considering petitioner's age and health, the court concluded that continued and lengthy incarceration of petitioner was in the best interest of the public. The court therefore sentenced petitioner to concurrent terms of 20 years' imprisonment on each count.

2. On direct appeal from his conviction, petitioner did not challenge the sufficiency of the evidence or otherwise argue that he was not guilty of the charged offense. Instead, he challenged his conviction based on alleged improprieties in the government's cross-examination of him at trial, its alleged "bolstering" of a government witness by reference to the witness's plea agreement, and a statement by the judge in ruling on a defense objection to certain evidence. Petitioner also challenged his sentence under the DSO statute.

In his attack on the DSO sentence, petitioner argued that, by requiring proof of dangerousness only by a preponderance of the evidence, the DSO statute violated the Fifth Amendment Due Process Clause. He contended that due process requires proof of dangerousness beyond a reasonable doubt or, at the least, by clear and convincing evidence. Petitioner also argued that the statutory definition of "dangerous" was impermissibly vague and that the district court's findings were clearly erroneous.

In response to petitioner's challenge to his sentence, the government pointed out that courts have uniformly rejected the claim that due process requires a finding of dangerousness beyond a reasonable doubt and have approved the statutory standard of preponderance of the evidence. See, *e.g.*, *United States* v. *Fatico*, 603 F.2d 1053, 1057 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The government also noted the judicial rejection of peti-

tioner's claim that the statutory definition of dangerousness was unconstitutionally vague. See, *e.g.*, *United States* v. *Neary*, 552 F.2d 1184, 1194 (7th Cir.), cert. denied 434 U.S. 864 (1977). Finally, the government noted that a finding of dangerousness under the statute does not require proof of a propensity for violence; persons can be dangerous if they exhibit a clear disregard for the law and the rights of the public. *United States* v. *Warme*, 572 F.2d 57, 62 (2d Cir.), cert. denied, 435 U.S. 1011 (1978); *United States* v. *Ilacqua*, 562 F.2d 399, 404 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978); *United States* v. *Provenzano*, 605 F.2d 85, 93 (3d Cir. 1979). Petitioner's long-time association with highly placed organized crime figures afforded him a dangerous influence over organized crime activities, and his continuing criminal conduct, including his admitted bookmaking operations, demonstrated an obvious disregard for the law and the rights of the public.

In its unpublished opinion affirming petitioner's conviction and sentence, the court of appeals noted petitioner's challenge to his sentence under 18 U.S.C. 3575 but rejected it without discussion. App., *infra*, 2a n.1, 11a. The court stated simply that it had "considered [petitioner's] other claims of reversible error and [found] them to be without merit" (*id.* at 11a). Petitioner did not seek rehearing or argue that 18 U.S.C. 3576 requires a statement by the court of appeals of the reasons for its disposition of his challenge to his sentence. Nor did petitioner seek review of the court of appeals' decision in this Court.

3. Four years after his conviction was affirmed on direct appeal, petitioner filed a motion in the district court, pursuant to 28 U.S.C. 2255, to vacate his conviction and sentence. He claimed, inter alia, that the court of appeals' failure to state its reasons for affirming his DSO sentence denied him due process. He also argued that his trial counsel had been ineffective for two reasons: first,

because he failed to object to the admission of evidence relating to the acts charged in the count of the indictment on which petitioner had earlier been acquitted; second, that he did not seek to exclude or limit the introduction into evidence of petitioner's prior convictions or the fact that he had been incarcerated.

The district court—the same judge who had presided over petitioner's two trials and the DSO hearing—denied the petition for collateral relief (Pet. App. 1a-3a). The court concluded that the record "reveals no failure of constitutional due process resulting from the appellate court review of the enhanced sentence" (*id.* at 3a). The court also held that there was no ineffectiveness in counsel's failure to seek exclusion of evidence relating to a count on which petitioner had earlier been acquitted, because that evidence was relevant to the pending conspiracy charge (*id.* at 2a). With regard to petitioner's claim that counsel had been ineffective for failing to prevent the admission of evidence of his prior convictions and imprisonment, the court found "no violation" of any evidentiary rules "nor any quarrel with the tactical decision of counsel to put the defendant on the witness stand" (*ibid.*). The court of appeals affirmed.

ARGUMENT

1. Petitioner first contends (Pet. 5-9) that the court of appeals denied him due process by failing, in violation of 18 U.S.C. 3576, to review his DSO sentence and to state in writing its reasons for affirming the sentence. This contention raises no issue of continuing importance, because the DSO statute has been repealed effective November 1, 1987. See Pub. L. No. 98-473, §§ 212(a)(2) and 235, 98 Stat. 1987, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728. In any event, the contention is without merit.

To begin with, petitioner is simply wrong in asserting that the court of appeals failed to review his sentence. The specific factors presented to and considered by the district court in arriving at the appropriate sentence were twice set forth in great detail before the court of appeals: initially, in the government's response to petitioner's motion for bail pending appeal, which was denied by the court of appeals; and again, in petitioner's direct appeal and the government's responding brief. Moreover, the court of appeals' unpublished opinion expressly noted petitioner's challenge to his DSO sentence. App., *infra*, 2a n.1. Although the court did not articulate its reasons for rejecting the challenge, it is clear from the opinion that the court of appeals considered and rejected petitioner's contentions on that issue.

The court of appeals' failure to state in writing its reasons for rejecting the attack on the DSO sentence obviously does not rise to the level of a due process violation. Moreover, petitioner's challenge on this ground (like the factually inaccurate assertion that the court of appeals failed to review the sentence) was waived by petitioner's failure to raise the issue to the court of appeals (by a rehearing petition) or to this Court (by a petition for certiorari) on direct appeal, when any error could have been quickly corrected. Petitioner has not passed either part of the "cause and prejudice" test for excusing his waiver. See *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); see also *Murray* v. *Carrier*, No. 84-1554 (June 26, 1986); *United States* v. *Timmreck*, 441 U.S. 780, 783-784 (1979); *Norris* v. *United States*, 687 F.2d 899, 903 (7th Cir. 1982). Petitioner has not even alleged any cause for his failure to request a specific account of the reasons his sentence was affirmed on direct appeal. And the evidence of petitioner's illegal activities demonstrates that petitioner suffered no prejudice from the absence of written reasons for rejection (or, indeed, from any deficiency in appellate review) of his challenge to his DSO sentence.

Petitioner also seeks to argue (Pet. 6-8) that dangerousness must be proved by more than a preponderance of the evidence. This claim, however, is not included in the questions presented in the petition (Pet. i). Moreover, because petitioner made this argument and lost on direct appeal, the argument provides no ground for collateral attack. See *Barton* v. *United States*, 791 F.2d 265, 267 (2d Cir. 1986); *United States* v. *Kalish*, 780 F.2d 506, 508 (5th Cir. 1986), cert. denied, No. 85-1675 (May 19, 1986); *United States* v. *Redd*, 759 F.2d 699, 701 (9th Cir. 1985); *Tracey* v. *United States*, 739 F.2d 679, 682 (1st Cir. 1984), cert. denied, 469 U.S. 1109 (1985). In any event, as the courts of appeals uniformly recognize, there is no merit to the contention that due process requires a higher standard of proof of dangerousness than preponderance of the evidence. See *United States* v. *Darby*, 744 F.2d 1508, 1536-1538 (11th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); *United States* v. *Vigil*, 743 F.2d 751, 760 (10th Cir.), cert. denied, 469 U.S. 1090 (1984).

Petitioner further argues (Pet. 8-9) that the district court was obligated to sentence him under 18 U.S.C. 371 and 2314 prior to considering and imposing the DSO sentence. This contention, like petitioner's burden-of-proof argument, is not included in the questions presented in the petition (Pet. i). In any event, it is meritless. The DSO statute nowhere requires the procedure that petitioner proposes. Although the court must ensure that its DSO sentence is not disproportionate to the "maximum term otherwise authorized by law" for the particular felony convictions (18 U.S.C. 3575(b)), the statutes defining the felonies themselves provide that information (for 18 U.S.C. 371, five years' imprisonment and a $10,000 fine; for 18 U.S.C. 2314, ten years' imprisonment and a $10,000 fine). And there is simply nothing in the decisions cited by petitioner (Pet. 9) to suggest that the proposed two-step sentencing procedure is required. *United States* v. *Soto*, 779 F.2d 558,

559 (9th Cir. 1986); *United States* v. *Scarborough*, 777 F.2d 175, 176 (4th Cir. 1985); *United States* v. *Calabrese*, 755 F.2d 302, 305 (2d Cir. 1985).

2. Petitioner also contends (Pet. 10-13) that he was denied the effective assistance of counsel at his trial. The district judge who presided over petitioner's trial and sentencing proceeding found otherwise. Pet. App. 1a-2a. That conclusion is fact-bound and correct. Further review by this Court is not warranted.

a. Petitioner first claims (Pet. 10, 11) that his trial counsel was ineffective for failing to seek exclusion of evidence that was related to the charge of transportation of stolen securities from Florida to Texas, for which he had been acquitted at his first trial. Petitioner fails to identify what evidence he thinks was improperly admitted at the second trial. Moreover, contrary to petitioner's apparent misconception, the collateral estoppel ban on relitigating certain issues does not prohibit the use of evidence introduced in a prior proceeding if that evidence is offered to prove different facts. Here, to the extent evidence concerning the transportation of stolen securities to Texas was admitted at petitioner's second trial, it was not offered to establish that petitioner engaged in or caused such transportation, as alleged unsuccessfully in the first trial; rather, it was offered to prove the conspiracy of which petitioner was convicted in the second trial.

Our examination of the second trial transcript reveals that very little was said about the transportation of stolen stock certificates to Texas. One reference was made by co-conspirator Alva Rodgers, who testified that he gave some of the blank certificates to David Pemberton and expected him to sell them in Texas (14 R. 140-141). Rodgers was subsequently told that Pemberton had been arrested at the Dallas/Fort Worth Airport with a suitcase full of money

(14 R. 141). Unable to locate any news reports of the arrest, however, Rodgers surmised that the reason he saw no profit from the certificates was not that Pemberton had been arrested but, instead, that Pemberton had stolen the certificates. A second reference to Texas occurred days later, during Pemberton's testimony. Pemberton testified about his efforts to sell the stolen certificates, including his dealings with an individual in Texas who had Mexican contacts and agreed to take some of the certificates (15 R. 306, 308). Pemberton testified that he flew to Dallas to exchange the securities for cash and was arrested there with 1400 shares (15 R. 310-313). He then explained how other members of the conspiracy were to participate in the anticipated profits from the 1400 shares of stock (15 R. 313-319).

This testimony concerning the transportation of the stolen shares to Texas was offered not to show that petitioner transported the shares to Texas or caused them to be transported, but for the legitimate purpose of proving the existence and nature of the conspiracy. Accordingly, as the district court concluded in denying collateral relief (Pet. App. 2a), counsel committed no error in failing to seek exclusion of this admissible evidence. In any event, petitioner has not demonstrated how he was prejudiced by the admission of the evidence. See *Strickland* v. *Washington*, 466 U.S. 668 (1984).

b. Petitioner also alleges (Pet. 10, 11-12) that he was deprived of effective assistance of counsel because of his lawyer's failure to prevent the admission, during the government's case-in-chief, of evidence of petitioner's prior incarceration. Again, petitioner fails to identify where in the record the allegedly prejudicial reference occurred. In fact, the single such reference that petitioner apparently has in mind was inadvertent and was objected to by counsel. It was also harmless, especially when considered in light of petitioner's decision to testify about his prior incarceration and convictions.

In December 1972, petitioner was released from the Atlanta Federal Penitentiary, where he had been serving a ten-year sentence. While in prison, he became acquainted with co-conspirator Rodgers, a jailhouse lawyer who assisted petitioner in seeking collateral relief from his conviction. As a result of Rodgers' efforts, petitioner was released from the penitentiary approximately 11 months earlier than originally scheduled. In gratitude, petitioner suggested that Rodgers come to Chicago upon his release. Rodgers did so. Petitioner found a rent-free apartment for him, and the two men began to spend considerable time together.

This background to their friendship was a crucial part of the government's case. Rodgers, however, did not testify that the two men met in jail; he referred during the government's direct examination simply to their association in "Georgia" and the friendship that resulted from their daily contact (14 R. 69-70, 75-78). The government tried to exclude reference to petitioner's prior incarceration: for example, in phrasing a question to Rodgers, the government asked "without specifying a particular place, were there conversations between [petitioner], yourself, and other people, people that you knew previously in your life?" (14 R. 71). Rodgers' reference to petitioner's prior incarceration was inadvertent and came just prior to that cautionary question. Rodgers began a response, "Well, we had a man who was in our cell quite often from * * *" (14 R. 70). Petitioner's counsel interrupted the answer and objected; the prosecutor withdrew the question; and the court announced that the question was withdrawn. The unsolicited slip by Rodgers was plainly not so prejudicial as to call for a mistrial, and counsel was therefore not ineffective in failing to move for that relief. Moreover, petitioner's own testimony concerning his prior criminal

history nullified any possible prejudice that could have resulted from Rodgers' single mention of the word "cell."[2]

c. Finally, petitioner challenges (Pet. 10-12) counsel's failure to secure exclusion of petitioner's history of prior convictions (as opposed to the fact of his incarceration). In particular, he challenges counsel's failure to move to exclude the evidence on the ground that it was too stale, as well as counsel's decision to elicit petitioner's prior criminal history during his direct examination of petitioner. Under Fed. R. Evid. 609, however, the prior crimes evidence was clearly admissible for impeachment purposes. Fed. R. Evid. 609(b) provides that evidence of a conviction is admissible if the witness was released from confinement for the conviction less than ten years before the trial. Petitioner was sentenced to ten years' imprisonment for his October 1966 conviction and to two years' imprisonment, consecutive to the ten-year sentence, for a 1968 conviction. Petitioner was not released from confinement for those convictions until December 1972. Because petitioner's trial in this case took place in March 1980, both of those convictions were admissible under the ten-year rule of Fed. R. Evid. 609(b). Counsel was therefore not ineffective for failing to file a fruitless motion to exclude evidence of the convictions.

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[2] *Tallo* v. *United States*, 344 F.2d 467 (1st Cir. 1965), *United States* v. *Smith*, 403 F.2d 74 (6th Cir. 1968), *United States* v. *Gray*, 468 F.2d 257 (3d Cir. 1972) (en banc), and *United States* v. *Sostarich*, 684 F.2d 606 (8th Cir. 1982), do not support petitioner. In *Tallo*, the defendant did not testify or otherwise voluntarily expose his prior history; moreover, counsel did not object when the evidence came in. In the remaining cases, the prosecutor improperly elicited the challenged reference. In any event, the prejudicial impact of attorney errors is determined in part by the weight of the evidence at trial. Here, both direct testimony by co-conspirators and corroborative evidence pointed strongly to petitioner's guilt.

Petitioner's challenge to his counsel's examination of him concerning his prior convictions is similarly meritless: the examination was the result of a deliberate and reasonable plan to try to blunt the impact of the evidence, which was bound to come out during the government's cross-examination of petitioner. Counsel's questions elicited innocent explanations for the prior convictions—that one conviction, which was based on an extortionate collection of a debt, was erroneous because petitioner's meeting with the debtor was innocent and non-threatening (15 R. 378-383); that another, for possession of stolen securities, was erroneous because petitioner did not know that the certificates were stolen (15 R. 383-389). Petitioner's counsel committed no unprofessional error in eliciting these explanations before the government asked about petitioner's convictions on cross-examination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-5433

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARSHALL CAIFANO, A/K/A "JOHN MARSHALL",
DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Florida

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January 26, 1982

Before THORNBERRY*, FAY and HATCHETT, Circuit Judges.

PER CURIAM:

This appeal requires a review of whether the trial court erred in permitting the prosecution to exceed the permissible scope of cross-examination and to improperly bolster the testimony of its chief witness. We affirm.

FACTS

In October, 1968, five thousand blank and unissued Westinghouse Electric Corp. common stock certificates were stolen during shipment from New York to Chicago. Appellant, Marshall Caifano, subsequently was indicted for conspiracy to possess stolen securities which moved

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* The Honorable Homer Thornberry, Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

in interstate commerce, 18 U.S.C. § 371 (Count I), the transportation in interstate commerce of stolen securities, 18 U.S.C. §§ 2 and 2314 (Count II), and the possession of stolen securities, 18 U.S.C. § 659 (Count V). The government's chief witness, Alva Johnson Rodgers, was named in the indictment as Caifano's co-defendant and co-conspirator.

Following a trial in February, 1980, a jury acquitted appellant on Count V but was unable to reach a verdict as to the two remaining counts. Appellant was retried and convicted on these counts in March, 1980. After a hearing, the district court found appellant to be a dangerous special offender and sentenced him to a twenty-year term as to each count to run concurrently.

On appeal, Caifano argues that the government overstepped the limits of proper cross-examination and committed prejudicial error in improperly bolstering the testimony of its key witness.[1]

ISSUES

We must consider whether the government committed reversible error on cross-examination in attacking defendant's character by (1) extensively inquiring into the details of prior convictions admitted by defendant on direct examination, (2) suggesting the existence of prior unindicted offenses, (3) revealing that defendant had few "legitimate" jobs in his lifetime, (4) implying that defendant was connected with organized crime, and (5) emphasizing that he was under police surveillance. We must also examine

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[1] Appellant also requests this court to set aside his sentence, contending that the statute under which he was sentenced, the "Dangerous Special Offender" statute, 18 U.S.C. § 3575, is unconstitutional on its face and as applied herein. In addition, Caifano urges that a new judge should preside on remand since the trial court was exposed to information concerning defendant's status as a dangerous special offender.

whether the prosecutor committed prejudicial error in bolstering its key witness by eliciting from him the fact of his guilty plea in the instant case and by commenting that the plea agreement had been signed by the prosecutor and submitted to the trial court.

UNFAIR CROSS-EXAMINATION

Appellant contends that the cross-examination on details of his prior offenses exceeded the permissible bounds of impeachment under Rule 609 of the Federal Rules of Evidence.[2] Testifying in his own behalf, Caifano admitted that he had been convicted in 1968 of extortion, and that shortly thereafter he had pleaded guilty to an offense that "had something to do with stocks and bonds." In explaining the extortion conviction on direct examination, appellant stated that he merely attempted to collect a gambling debt for a "friend." He also stated that he chose not to testify at that trial because he was confident that the facts would show that he used no force against the victim and that he believed he would be acquitted. In explaining the securities conviction, appellant testified that he was with other persons who had stolen the securities which they were going to use as collateral for a loan. Caifano further stated that he pleaded guilty on the advice of his counsel and to avoid trial expenses.

On cross-examination, appellant admitted that he decided not to testify in the extortion trial only after he heard all

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[2] Fed. R. Evid. 609 provides, in pertinent part:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

of the government's evidence. Caifano further stated that his "friend" denied that he had authorized appellant to collect a debt for him. Caifano also admitted that the victim testified that he was beaten up in a car by appellant's co-defendant in appellant's presence. With respect to the securities conviction, appellant admitted that he had pleaded guilty to interstate transportation of stolen securities and that he had received $11,000 in profits in connection therewith.

Caifano contests the scope of the government's cross-examination concerning his prior criminal record after he raised the subject of his prior convictions in taking the stand in his own defense. For impeachment purposes, the prosecutor may properly inquire into the number, date, and nature of prior convictions on cross-examination of the accused, but ordinarily is precluded from examining the details of the crime for which the accused was convicted. *United States v. Tumblin,* 551 F.2d 1001, 1004 (5th Cir. 1977); *United States v. Bray,* 445 F.2d 178, 182 (5th Cir. 1971), *cert. denied,* 404 U.S. 1002 (1972); *United States v. Wolf,* 561 F.2d 1376, 1381 (10th Cir. 1977).

Where, however, an accused on direct examination attempts to "explain away" the effect of the conviction or to minimize his guilt, the government may cross-examine him on facts relevant to the direct examination. *United States v. Barnes,* 622 F.2d 107, 109 (5th Cir. 1980); *United States v. Wolf,* 561 F.2d at 1381. A defendant who testifies in his own defense "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Brown v. United States,* 356 U.S. 148, 155 (1958), *quoting Fitzpatrick v. United States,* 178 U.S. 304, 315 (1900). Indeed, it would be unfair to delimit cross-examination so that the defendant could choose to testify on direct examination in a manner which would "provide himself with a shield against contradiction of his untruths . . . in reliance on the

Government's disability to challenge his credibility." *Walder v. United States,* 347 U.S. 62, 65 (1954).

In the instant case, the effect of Caifano's testimony on direct examination was to explain away his active role in the offenses that were the subject of his prior convictions and effectively to deny his guilt. The rebuttal was therefore admissible on a theory of "opening the door" to remove any unfair prejudice which may have resulted from Caifano's attempt to minimize his guilt. *Wolf,* 561 F.2d at 1381; *United States v. Winston,* 447 F.2d 1236, 1240 (D.C.Cir. 1971), *citing California Insurance Co. v. Allen,* 235 F.2d 178, 180 (5th Cir. 1956).

Because appellant put in issue and distorted his motive for failing to testify at the extortion trial and for pleading guilty to the securities offense and depicted his role in the events leading to his extortion conviction as innocent and peaceable, we find that the cross-examination was sufficiently relevant to Caifano's direct testimony as to preclude any error. Further, we do not find any error in permitting the prosecutor to elicit from the appellant the length of his confinement. *Barnes,* 622 F.2d at 109; *Beaudine v. United States,* 368 F.2d 417, 421 n.8 (5th Cir. 1966).

Caifano also argues that because of the similarity between the prior securities conviction and the offense which is the subject of the instant case, the prosecutor's ability to inquire into the details of that prior offense should have been severely restricted because of the likelihood of prejudice. *United States v. Turquitt,* 557 F.2d 464, 468-69 (5th Cir. 1977); *United States v. Hayes,* 553 F.2d 824, 828 (2nd Cir.), *cert. denied,* 434 U.S. 867 (1977). Where the defendant is a witness, such cross-examination creates the possibility that the jury will consider the criminal nature which is the subject of the prior conviction as evidence that the defendant acted illegally on the occasion in question. *Barnes,* 622 F.2d at 109. The cross-examination on

the security conviction, however, as noted above, was proper as impeachment by contradiction. On direct examination, Caifano painted himself as a picture of innocence by stating that the securities conviction "had something to do with stocks and bonds" and on cross-examination by further noting that "evidently they were gotten in a legitimate way somehow."

Appellant also complains that the prosecutor improperly suggested on cross-examination that he had been the subject of an income tax evasion investigation. The trial court sustained defense counsel's objection to the question. Because this examination was brief and because the government elicited no details or explanations, we find that this testimony was harmless. *United States v. Wilkinson,* 601 F.2d 791, 797 (5th Cir. 1979).

We also disagree with appellant's contention that the cross-examination concerning his representation of the "Chicago interest" in a Las Vegas country club suggested that he was involved in organized crime. The question was proper in light of Caifano's direct testimony that his business concerns in Las Vegas were connected with his real estate and construction business. Further, the reference to "Chicago interest" did not introduce the spectre of organized crime but rather was explained by the prosecutor to mean "that people from Chicago had a cut of the [country club's] profit." The cases cited by appellant are inapposite as they involve the highly prejudicial use of widely recognized terms which suggest involvement in organized crime or other well-known enterprises of ill-repute. *See, e.g., United States v. Marques,* 600 F.2d 742, 749 (9th Cir. 1979), *cert. denied,* 444 U.S. 858 (1980) (Hell's Angels); *United States v. Love,* 534 F.2d 87, 88 (6th Cir. 1976) (mafia and organized crime).

We also find that appellant, having "opened the door" with the testimony about his prior employment to support the implication that he was an honest retired businessman,

cannot complain about the government's questions which offset the inference of lawful industriousness portrayed on direct examination. *California Ins. Co. v. Allen,* 235 F.2d at 180.

In addition, appellant argues that the government's inquiry into his awareness that he was a target of police surveillance was irrelevant other than to suggest that the defendant was a "bad man." After reading the record and considering the allegation, we deem any improprieties inherent in this cross-examination harmless error in view of the overwhelming evidence against appellant. *United States v. Sandini,* 660 F.2d 544, 546 (5th Cir. 1981).

IMPROPER BOLSTER

On the government's direct examination of co-defendant Rodgers in this trial, the prosecutor asked him whether "in connection with the case pending where you are going to be sentenced by Judge Paine, is there a plea agreement letter signed by both yourself, your attorney, and myself?" Rodgers admitted that there was and that the agreement had been submitted to the trial judge. Defense counsel neither objected to Rodger's testimony relating to his guilty plea nor requested a limiting instruction from the court. Further, appellant vigorously cross-examined Rodgers concerning his plea and indicated that Rodgers had pleaded guilty to the same charges pending against appellant by asking whether Rodgers had entered a plea "to certain counts of the indictment" and by emphasizing that the trial court would consider the nature and extent of Rodgers's cooperation in meting out his sentence "in this case."

It was not until several days later that appellant sought a mistrial on the basis of the government's revelation of Rodgers's guilty plea. The trial court offered to give a cautionary instruction on the purpose for which the testimony concerning the plea was admitted but appellant

objected that a cautionary instruction would not correct the error. The court subsequently denied the motion for a mistrial on the ground that the government had sought to elicit the criminal record of the witness in anticipation of an attack on his credibility on cross-examination, and not for the purpose of proving the charges in the indictment. Defense counsel then requested that the court refrain from issuing a cautionary instruction restricting the use of the guilty plea.

Appellant argues that the government committed plain error by improperly eliciting from its key witness, defendant's alleged co-conspirator, that he had entered a guilty plea and was awaiting sentencing by the trial judge. Caifano urges that the prosecutor thereby prejudiced appellant by unfairly suggesting that because the co-defendant was guilty of the same charges, the appellant must be guilty as well. In addition, appellant contends that the government impermissibly vouched for its witness's credibility by revealing that the prosecutor signed the plea agreement and that the agreement had been submitted to the judge. The prosecution, Caifano argues, compounded this prejudice in closing argument by reemphasizing the fact of the guilty plea and by suggesting that he and the judge believed the witness truthful. The government, however, argues that it was entitled to elicit the guilty plea because it was clear that the defense strategy would be to impeach the witness's credibility.

Because of the potential for prejudice inherent in a co-defendant's tetimony that he has pleaded guilty to the crime for which the defendant is charged, it is well settled that a co-conspirator's guilty plea or conviction may not be used as substantive evidence of the guilt of another. *United States v. Alanis,* 611 F.2d 123, 126 (5th Cir.), *cert. denied,* 445 U.S. 955 (1980); *United States v. King,* 505 F.2d 602, 607 (5th Cir. 1974). The conviction or guilty plea of a co-conspirator, however, his admissible for limited

evidentiary purposes such as impeachment. *United States v. Miranda,* 593 F.2d 590, 594 n.4 (5th Cir. 1979); *King,* 505 F.2d at 607.

In assessing whether the admission of the plea constituted plain error, we must carefully examine all the facts and circumstances of this particular case including

> the presence or absence of a limiting instruction; whether there was a proper purpose in introducing the conviction or guilty plea of the codefendant; whether the plea or conviction was improperly emphasized or used as substantive evidence of guilt; whether the alleged error was invited by defense counsel; whether an objection was entered or an instruction requested; whether the failure to object could have been the result of tactical considerations; and whether, in light of all the evidence, the error was harmless beyond a reasonable doubt.

United States v. Jimenez-Diaz, 659 F.2d 562, 566 (5th Cir. 1981), *citing, United States v. King,* 505 F.2d 602, 608 (5th Cir. 1974); *Miranda,* 593 F.2d at 594.

After a careful review of the record, we are firmly convinced that the admission of Rodger's guilty plea presented no reversible error. The prosecutor made no impermissible use of the plea and did not argue to the jury that the plea should be used as substantive evidence of the defendant's guilt. Rather, the prosecutor merely argued that Rodgers's testimony was worthy of belief and should be accorded significant weight. *Jimenez-Diaz,* 659 F.2d at 566; *Miranda,* 593 F.2d at 595. Further, the Fifth Circuit has held that where the prosecutor introduces the co-defendant's guilty plea on direct and neither stresses that plea nor intimates to the jury that the defendant's guilt can be inferred from the co-defendant's guilty plea, the trial court's failure to give an unrequested cautionary instruction is not plain error. *King,* 505 F.2d at 609; *United States v. Rothman,* 463 F.2d 488, 490 (2nd Cir.), *cert. denied,* 409 U.S. 956 (1972).

In addition, it was clear from defense counsel's opening statement and cross-examination of Rodgers at the first trial that his impeachment was a primary defense tactic. Thus, defense counsel "invited" the prosecutor's comments on direct examination of Rodgers at the second trial to "soften the blow" of impeachment and to minimize the impression that the government was trying to conceal Rodgers's guilty plea. Further, where, as here, the co-defendant appeared in court and was subject to cross-examination and no "aggravating circumstances" are shown, disclosure of the guilty plea to thwart the impact of credibility attacks serves a legitimate purpose and is permissible. *United States v. Romeros,* 600 F.2d 1104, 1105 (5th Cir. 1979), *cert. denied,* 444 U.S. 1077 (1980); *United States v. Veltre,* 591 F.2d 347, 349 (5th Cir. 1979). Alternatively, in view of all the evidence, we find the error harmless beyond a reasonable doubt. *Jimenez-Diaz,* 659 F.2d at 566.

Appellant also challenges the prosecutor's closing argument as an impermissible vouching for his witness's credibility. It is well settled that an attorney may not express his own opinion as to the credibility of witnesses. *E.g., United States v. Morris,* 568 F.2d 396, 401 (5th Cir. 1978); *United States v. Herrera,* 531 F.2d 788, 790 (5th Cir. 1976). To warrant reversal, prosecutorial misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Alanis,* 611 F.2d at 126.

We find that the prosecuting attorney committed error when he stated that Rodgers was "telling a complete and utter truth because Judge Paine is the one who was going to sentence him. His motive is to tell the truth; is to be as open as possible." Although the prosecutor's comments constitute error, they did not amount to reversible error. Because we find, upon an examination of the entire record, that the defendant did not suffer substantial prejudice, we hold the error harmless. *Alanis,* 611 F.2d at 127;

Morris, 568 F.2d at 402. We also find that the admission of the fact of the plea agreement did not constitute an impermissible bolstering by the prosecutor of his witness. *United States v. Martino,* 648 F.2d 367, 389 (5th Cir. 1981).

We have considered appellant's other claims of reversible error and find them to be without merit.

CONCLUSION

Because we find that the government's cross-examination of appellant and its bolstering of its chief witness did not constitute reversible error, appellant's conviction is affirmed.

AFFIRMED

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